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FALSE CONSCIOUSNESS AND PRESIDENTIAL WAR POWER: EXAMINING THE SHADOWY BENDS OF CONSTITUTIONAL CURVATURE

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Absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely persona, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.

—John Jay, Federalist No. 4[1]

A parallel conception in the legal universe would hold that, just as space cannot extricate itself from the unfolding story of physical reality, so also the law cannot extricate itself from social structures; it cannot "step back," establish an "Archimedean" reference point of detached neutrality, and selectively reach in, as though from the outside, to make fine-tuned adjustments to highly particularized conflicts.

—Laurence H. Tribe[2]

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1. *See* Michael T. William, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 740 (1997).

2. *See* Laurence H. Tribe, *Essay: The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 1–34

I. EXECUTIVE WAR POWER POST-9/11

Assertion of comprehensive presidential power within the current Bush Administration has become the cause célèbre of recent times. This assertion is evident through many acts of warrantless surveillance of citizens,[3] indefinite detention of enemy combatants abroad,[4] and torture of detainees in executive custody.[5] The Bush Administration's unilateral usurpation of executive power has given rise to the specter of unitary executive. The assertions of unilateral executive power raise important questions[6] concerning the limits of the

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(1989).

3. I discuss this aspect of presidential transgressions in Saby Ghoshray, *Untangling the Legal Paradigm of Indefinite Detention: Security, Liberty and False Dichotomy in the Aftermath of 9/11*, 19 ST. THOMAS L. REV. 249 (2006).

4. Most individuals detained by the United States military in its global initiative on terrorism and those who have the maximum likelihood of being tried under the rules of military tribunal are called enemy combatants. *See generally id. see also* Gary Solis, *Even a 'Bad Man' Has Rights*, WASH. POST, June 25, 2002, at A19 ("Until now, as used by the attorney general, the term "enemy combatant" appeared nowhere in U.S. criminal law, international law or in the law of war. The term appears to have been appropriated from ex parte Quirin, the 1942 Nazi saboteurs case, in which the Supreme Court wrote that "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property [would exemplify] belligerents who are generally deemed not to be entitled to the status of prisoner of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.").
The United States government has used an antiquated case, *Ex parte Quirin*, 317 U.S. 1 (1942), to justify its denial of POWs' rights to the detainees. *See id.* 30–31 ("Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts, which render their belligerency unlawful."); *but see* Saby Ghoshray, *On the Judicial Treatment of Guantanamo Detainees in the Context of International Law*, GUANTANAMO BAY: JUDICIAL-MORAL TREATMENT OF THE OTHERS 88, 115 (2007) (arguing that the Fourth Geneva Convention of 1949 is closer in relevance to the case of detainees from the war in Afghanistan).

5. *See* Walter Pincus, *Silence of 4 Terror Probe Suspects Poses Dilemma*, WASH. POST, Oct. 21, 2001, at A6 (reporting that FBI and Justice Department investigators are considering "[u]sing drugs or pressure tactics, such as those employed occasionally by Israeli interrogators, to extract information" and "extraditing the suspects to allied countries where security services sometimes employ threats to family members or resort to torture."). *See also, e.g.*, Dana Priest & Joe Stephens, *Pentagon Approved Tougher Interrogations*, WASH. POST, May 9, 2004, at A1; Ghoshray, *supra* note 3.

6. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004). *See also* GlobalSecurity.org, Guantánamo Bay Detainees, http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm (last visited July 13, 2008); *United States of America: The Threat of a Bad*

President's powers under Article II and the relationship between Congress and the President in the area of war power. Never in the last half-century, has the scope of executive war power come under scrutiny from various constituents. As the invasion of Iraq enters its fourth year, critics of the war have become more vociferous than ever. From grass roots citizens groups[7] to non-governmental organizations,[8] from state officials to individual congressional representatives,[9] the calamitous impact of the war and its lingering aftermath has become the rallying cry for combating executive excess in America.

The collateral consequences of the Iraq War[10] and the questionable rationale provided by the President to justify the War[11] have reinvigorated the constitutionality of supporting a

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Example: Undermining International Standards as 'War on Terror' Detentions Continue, AMNESTY INT'L., Aug. 19, 2003, at 5, 15 *available at* http://www.amnesty.org/en/library/info/AMR51/114/2003.

7. *See* John Nichols, *Censuring Bush Requires Citizens' Help*, MADISON CAPITAL TIMES (Wisconsin), December 27, 2005, at 8A, *available at* http://www.commondreams.org/views05/1227-29.htm. Bonifaz, an attorney and the author of the book *Warrior King: The Case for Impeaching George Bush*, argues, "Now is the time to return to the rule of law and to hold those who have defied the Constitution accountable for their actions." *Id.*

8. *Id.*

9. *See* Laurie Kellman, *Hastert Demands FBI Return Documents*, THE ASSOCIATED PRESS, May 24, 2006, *available at* http://www.breitbart.com/article.php?id=D8HQ79QG2&show_article=1; *see also*, Carl Hulse, *FBI Raid Divides GOP Lawmakers and White House*, N.Y. TIMES, May 24, 2006, at A1.

10. I examined collateral consequences in detail in a forthcoming paper, Saby Ghoshray, *When Does Collateral Damage Rise To War Crime?: Examining the Adequacy of International Laws of War*, 41 CREIGHTON L. REV. (forthcoming 2008).

11. The U.S. and British invaded Iraq under the preventative war paradigm, without any specific relevant U.N. mandate, nor did they have any international authorization. Based on data available, it is clear that there existed no immediate threat to either the United States or the world as of March 20, 2005.. Plenty of evidence has come forward that indicates that the war was sold to both the public and the media under faulty intelligence. *See* C. Greenwood, *The Legality of Using Force Against Iraq, Memorandum to the Select Committee on Foreign Affairs* (2003), *available at* http://www.parliament.the-staionary-office.co.uk/pa/cm200203/cmslect/cmfaff/196/2102406.htm; *see also* Lord Goldsmith, *Legal Basis for the Use of Force Against Iraq: Answer to Parliamentary Question* (2003), http://www.number-10.gov.uk/outpost/page3287.asp. That Iraq did not possess weapons of mass destruction (WMD) can be inferred in the British Government report in HM GOVERNMENT, IRAQ'S WEAPON OF MASS DESTRUCTION: THE ASSESSMENT OF THE BRITISH GOVERNMENT OF LONDON (2002). "Former CIA director Stansfield

unitary executive.[12] As a result, a slew of significant questions have arisen. Can the Constitution put limits on a unitary executive whose unbridled hubris can impose calamitous war upon its citizens?[13] Is the constitutionally mandated process of congressional oversight still the most efficient bulwark against preventing presidential excesses on war making?[14] What are the remedies when the

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Turner accused the Bush administration Tuesday of 'overstretching the facts' about Iraqi weapons of mass destruction in making its case for invading that country." John Diamond, *Ex-CIA Director Says Administration Stretched Facts on Iraq,* USA TODAY, June 17, 2003, *available at* http://www.usatoday.com/news/washington/2003-06-17-turner-usat_x.htm.

12. This theory of unitary executive has been debated in recent days because President Bush has been claiming unitary executive privilege when it comes to his leadership role as President. In essence, the unitary executive privilege asserts that all executive authority is solely in the President's domain. But for example, in the domain of war or declaring war the unitary executive does not have legitimacy in the prevailing political and judicial parlance. The President cannot declare war without the Congress' approval. U.S. CONST. art 1, § 8. Only Congress can declare war. *Id.* Since arguably, Congress never officially declared war for the broadly named War on Terror, then the prevailing legal framework based on the Laws of War model is not validated, and thus not applicable. *See generally* Ghoshray, *supra* note 3.

13. The perils of an imperial presidency are at its greatest when that President plunges the nation into war. *See* Adam Cohen, *Just What the Founders Feared: An Imperial President Goes to War*, July 23, 2007, N.Y. TIMES, at A18, *available at* http://www.nytimes.com/2007/07/23/opinion/23mon4.html (endorsing the view that, the Congress has the authority to limit the President's war power in the event of constitutional showdown between the Congress and the President); *see also* John W. Dean, *The U.S. Supreme Court and the Imperial Presidency: How President Bush Is Testing the Limits of His Presidential Powers*, Jan. 16, 2004, http://writ.news.findlaw.com/dean/20040116.html ("This may be the most imperial Presidency our history has yet seen.").

14. Alexander Hamilton placed emphasis on controlling the war power the President held. In his concern he detailed how the President should handle his war power and this well crafted commentary helps in developing case against shrinking power of the President when it comes to war making. He specifically stated:

> The Governor to have a *negative* upon all laws about to be passed-and (to have) the execution of all laws passed-to be the Commander-in-Chief of the land and naval forces and of the militia of the United States- to have the entire direction of war when authorized or begun-to have, with the *advice* and *approbation* of the Senate, the power of making all treaties-to have the appointment of the *heads* or *chief* officers of the departments of finance, war, and foreign affairs-to have the *nomination* of all other officers (ambassadors to foreign nations included), subject to the approbation or rejection of the Senate to have the power of pardoning all offenses but *treason*, which he shall not pardon without the approbation of the Senate.

1 THE WORKS OF ALEXANDER HAMILTON, 348 (Henry Cabot Lodge, ed., 1885).

overwhelming power of the governmental machinery works feverishly to shape the collective consciousness of the nation by injecting debilitating fear in the minds of its citizens?[15] The President's shrewd manipulation of the Constitution's affirmative grant under wartime exigency, and Congress' refusal to provide legislative enactment as a formalized process of declaring war, has created an extremely relevant backdrop to ponder over these questions.

Despite scholarship supporting a broadening of presidential war making power,[16] I have responded to the above issues in an earlier work, which establishes that the remedy against imperial presidency still remains within a broader framework of shared war power.[17] However, I do concede that some difficulties remain with the shared power doctrine. This is most apparent when prudence and practicality dictate that Congress should exert its control to insulate the nation from absolute presidential power.[18] For

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Madison also placed emphasis on not allowing one sole decision maker, like the President, to declare war. Rather, James Madison asserted that the clauses in the Constitution vest war power to the Congress. He stated that, "The Senate [ought] to have the sole power of declaring war, the power of advising and approving all Treaties, the power of approving or rejecting all appointments of officers except the heads or chiefs of the departments of Finance War and foreign affairs." James Madison, *Notes on Debates in the Federal Convention of 1787*, June 18, 1787, *available at* http://www.yale.edu/lawweb/avalon/debates/618.htm#ham.

15. Although the Framers recognized the danger of an unchecked presidency, there are some openings by which the President can exert some war power. Such situations could arise when the duty of the President beckons him to protect the nation from imminent danger. However, in this article I open up the possibility of propagating a false paradigm of imminent danger. Therefore, a central inquiry of this paper revolves around recognizing various shades of imminent danger and how its characterization influences the distribution of war power between the Congress and the President. I argue that the limit of constitutional war power that the President can enjoy depends on fully evaluating this imminent danger paradigm.

16. The proponents of unchecked presidential war power espouse a framework where Congress' controlling power is diluted to allow for the emergence of an imperial presidency. *See* Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, THE NEW YORKER, July 3, 2006, at 44, *available at* http://www.newyorker.com/archive/2006/07/03/060703fa_fact1.

17. Shared war power comes from the concept of congressional control over presidential war power. I have discussed in detail how this paradigm of shared war power allows us to define the limits of the President's war power. *See* Saby Ghoshray, *Illuminating the Shadows of Constitutional Space: While Tracing the Contours of Presidential War Power*, 39 LOY. U. CHI. L.J. 295 (2008).

18. *See id.* (examining the difficulties of the shared power doctrine).

instance, when the monarchical governance of the President is bolstered by distorted reality of the populace, can Congress really intervene? Can Congress truly intervene, when the distorted reality is based on a heightened sense of imminent danger?

Imminent danger is the very reason that the affirmative constitutional grant of war making is bestowed upon the President. In light of such danger, how could Congress put the brakes on a nation headed on a path of war? Neither the existing scholarship, nor the history of the founding period provides any guidance into these uncertain, shadowy zones of constitutional quandary. Constitutional quandary comes from the vagueness of the constitutional text when the legal reasoning process becomes ineffective in providing particularized solution to specific legal problems. This issue was brought into the limelight in *Youngstown Sheet & Tube Co. v. Sawyer.*[19] Justice Jackson's concurrence identifies an area of concurrent control where the limits of presidential power get lost in dark canyons of constitutional space. I offered further insight into identifying the sources of this quandary in an earlier work,[20] where I brought in the concept of false consciousness as a factor that shapes the constitutional confusion. False consciousness, for introductory purposes, could be seen as a distorted version of collective consciousness that takes root among a larger collection of humanity, as a result of a multitude of factors, which I will discuss later in the article.

Accordingly, this article is structured around two threads of inquiry. The first delves into the shared power doctrine to examine issues like congressional inertia,[21] false

19. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *see also infra* note 21.

20. *See supra* note 17.

21. This is in reference to a particular category within Justice Jackson's tripartite framework. Justice Jackson created a dividing line between the authority of the President and that of Congress. In order of importance, Justice Jackson's three categories of legitimate authority are: (1) Cases in which the President was defying congressional orders. (He ruled the *Youngstown Sheet & Tube Co. v. Sawyer* case was in this category), (2) cases in which Congress had thus far been silent, and (3) those cases in which the President was acting with express or implied authority from Congress. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 6345–638 (Jackson, J., concurring).

History of the Founding period reveals that the President's ability to order military action was countenanced by the requirement of congressional

consciousness,[22] and provides extra judicial gloss on what Justice Jackson termed as the constitutional "zone of twilight."[23] The second, by invoking the curved space analogy introduced by Professor Laurence Tribe,[24] brings home the concept of examining the limits of presidential power as a complex proposition. My objective is not to present discrete rules of presidential grants, but to identify the fluid contours within a constitutional space where the bounds and limits of presidential authority can be framed.

By placing explicit reliance on the Constitution's affirmative grants manifested by the commander-in-chief power of the President, proponents of expansive presidential

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legislature. Charlie Savage, *Scholars are Split on the Bush Administration's Use of the Federalist Papers to Justify its Position on Presidential War Powers*, BOSTON GLOBE, June 11, 2006, http://www.boston.com/news/globe/ideas/articles/2006/06/11/recommended_reading/?page=1 (quoting The Federalist No. 69). Scholars have pointed out that the President can never order military action against sovereign nations. *See generally* David Gray Alder, *The Constitution and Presidential Warmaking: The Enduring Debate,* 103 POL. SCI. Q. 1, 1–36 (1988); Louis Fisher, *Unchecked Presidential Wars,* 148 U. PA. L. REV. 1637, 1637–72 (2000). Scholar David Gray Adler has argued that the "constitution makes congress the sole repository of the ultimate foreign relations power." David Gray Adler, *Court, Constitution, and Foreign Affairs, in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 19, 19 (David Gray Adler & Larry N. George eds., 1996). According to many experts like Louis Fisher, the justification to send troops overseas while bypassing Congress is wrong, if not illegal, as the Constitution states that Congress, not the President, has the power to declare war. *See* LOUIS FISHER, PRESIDENTIAL WAR POWER 1–7 (2d ed. 2004) (1995). As Fisher details, the Framers had good reason for their language:. "These models of executive power were well known to the framers. They knew that their forebears in England had committed to the executive the power to go to war. However, when they declared their independence from England, they rested all executive process in the Continental Congress," *Id.* at 2." On numerous occasions the delegates to the constitutional convention emphasized that the power of peace and war associated with monarchy would not be given to the President" *Id.* at 4.

22. I have examined this concept in detail elsewhere. *See* Saby Ghoshray, *Symmetry, Rationality and Consciousness: Revisiting Marcusean Repression in America's War on Terror, in* EROS AND LIBERATION: HERBERT MARCUSE'S VISION FOR A NEW ERA, (forthcoming 2008); *see also infra* Part II (discussing how false consciousness impacts imminent danger doctrine).

23. *See infra* Part II.

24. *See* Tribe, *supra* note 2. I borrowed this term from the article by Professor Tribe. In my view the limits of presidential war power can be found within the curvature space of the Constitution, characterized by its hidden valleys and peaks in which the intensity of the presidential war power could expand and shrink much like curvature space supports fluctuating forces in an object. I have examined this concept of presidential power within a curvature space in a forth coming paper.

power argue in favor of bypassing both judicial scrutiny and congressional authorization. The calamitous impact of the unbounded excess of presidential authority in the post-9/11 world, however, invites us to question the wisdom behind such legal reasoning, especially for its inability to properly place presidential responsibility within the relevant context. By drawing the meaning of presidential war power from both the historical underpinnings of the founding period and the jurisprudential development of the early Republic, I have examined the availability of constitutional grant for usurpation of presidential power. In my view, the Constitution does not support a liberal affirmative grant of war power that could remotely become synonymous with the executive transgressions we are currently witnessing.

Prompted by such disastrous possibilities premised upon the monarchical aspiration of a single individual, the Framers of the Constitution had put in place various checks and balances against untrammeled usurpation of power by a president. The forty-third presidency, the presidency of George W. Bush, has brought us face-to-face with the Constitution's binding prowess on a unitary executive. What constitutional remedies are at the nation's disposal when exaggerated exuberance of a president threatens to shake its very foundation? My goal in this article is to navigate the constitutional contours to search for the answer.

In my examination of the constitutional trajectories of presidential war power, I do not seek an explicit mandate from the Constitution's indeterminate text of Article II, nor do I pay obeisance to the emerging threat of the new war paradigm. Rather, I argue for invoking a post-modern theoretical framework in illuminating the dark canyons of the constitutional space. I propose straddling a careful balance between importing twentieth century advancements in physics along with the recognition of humanity's brace of distorted consciousness.

In my article, I seek to explain presidential war power through the curved space of the Constitution, and acknowledge the existence of the illusionary realities that encapsulate all humanities. With this objective in mind, my article is segmented as follows. In Part II, I examine the shared power framework that emerged as a consequence of the jurisprudential development since Justice Jackson's

famous opinion in the *Steel Seizure* case.[25] My exploration continues into Part III, where I identify the framework by which presidential usurpation of untrammeled war power facilitates the existence of false consciousness.[26] This leads me to examine whether false consciousness can explain the asymmetry in the shared power doctrine in Part IV.[27] In Part V, I embark on an exploration of whether the curved space analogy, a concept borrowed from quantum physics, can assist in charting a new paradigm to solve particularized issues as complex as presidential power.[28] Finally, I conclude in Part VI that there is no place for executive excesses in war making within the vastly illuminated curvatures of the Constitution, and that the answer could perhaps come from our recognition of the need for constitutional jurisprudence to embrace post-modernity.[29]

II. DIFFICULTY IN THE SHARED WAR POWER PARADIGM

Scholars agree,[30] and I concurred in my earlier work,[31] that Justice Jackson's tripartite framework is one of the most resilient and workable frameworks to evaluate the constitutionality of executive actions. The appeal of Justice Jackson's framework can be appreciated through the dual rationality of the Constitution. First, by succinctly denying the constitutional possibilities of a unitary executive, Jackson's tripartite framework alerts us of the explicit mandate of congressional control even under exigent circumstances. Second, by alluding to the uncertain distribution of the concurrently held power between the President and Congress, Justice Jackson implicitly urges for

25. *See infra* Part II.
26. *See infra* Part III.
27. *See infra* Part IV.
28. *See infra* Part V.
29. *See infra* Part VI.
30. *See* Eric R. Haren, *From Steel Mills to Military Commissions: Congressional Responsibility Under* Youngstown *and* Hamdan, 1 HARV. L. POL'Y REV. (2006), http://www.hlpronline.com/2006/11/haren_01.html; *see also* Patricia L. Bellia, *Executive Power in* Youngstown's *Shadows,* 19 CONST. COMMENT. 87, 89 (2002), *available at* http://www.questia.com/googleScholar.qst;jsessionid=G6GQ6bmkJT1GZ3wdc9NnNnTZgzJ9rFPL77gYvDbZPFGpvH9cfsZd!-1912468643?docId=5000646322.
31. *See* Ghoshray, *supra* note 17, at 317–23.

ongoing debate in this area. This debate must proceed with the recognition that the concurrent power cannot manifest in a disjointed discrete allocation of power, but is best understood within the conception of a fluid spectrum of continuous power.

My primary objective is to identify the nature of this concurrent authority of war power between the President and Congress, which poses a few questions. How does this power evolve within a continuous spectrum? What are the scenarios under which the presidential authority attenuates under congressional control? Could there be a reverse scenario, where the President's control supersedes that of the Congress? I have recognized the difficulties of power allocation within a continuous spectrum in my earlier work on presidential war power.[32] I will address some of the issues left open from my previous Article by probing further into the nature of the shared power paradigm and the factors that shape the allocation of such power.

The difficulty of constitutional allocation of war power between the President and Congress has been echoed in Chief Justice Rehnquist's opinion in *Dames & Moore v. Regan*.[33] While still an associate Justice of the Court, Rehnquist observed: "In such a case the analysis becomes more complicated and the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on the consideration on all the circumstances which might shed light on the Legislation Branch toward such action including 'congressional inertia, indifference, quiescence.'"[34]

The central enquiry becomes the identification of specific factors that may either broaden or shrink the scope of presidential authority within a shared power doctrine. If shared power exists as a fluid spectrum of power, that either flows away or towards presidential sphere of influence, we must be able to identify the factors that influence such

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32. *Id.*

33. Dames & Moore v. Regan, 453 U.S. 654 (1981). This Supreme Court case revolved around the Executive Order given by former President Jimmy Carter. *Id.* at 654. The Executive Order froze Iranian assets located within the United States in a response to the Iran hostage crisis. *Id.*

34. *Id.* at 668–69 (quoting Youngstown Sheet and Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 637 (1952)).

actions. As I specifically focus on the factors that may accentuate the presidential authority, I am prompted to consider all circumstances, including "congressional inertia, indifference, quiescence."[35] It may however, be difficult to identify such factors due to the asymmetric nature of the shared power.[36] This difficulty has also been recognized by Chief Justice Rehnquist, who further noted in his opinion in *Dames & Moore*:

> It is doubtless the case in executive action in any particular action falls, not neatly in one of three pigeon holes, but rather at some point along a spectrum running from explicit congressional authorization for explicit congressional prohibition. This is particularly true in respect cases such as the one before us involving responses to international crises. The nature of which Congress can hardly been expected to anticipate in any detail.[37]

The problem emanates from that indeterminable region of shared power that revolves around the foreign relations discourse, which has neither been captured by Article I, nor encapsulated within Article II. This region can be understood as Justice Jackson's "zone of twilight" or that "indeterminable point on the spectrum" of Justice Rehnquist's analysis where Congress cannot exert control over a crisis. But, it is those very regions or zones that become highly vulnerable to executive absolutism. Collateral consequences of the Iraq War[38] have demonstrated how giving in to presidential absolutism can extract exorbitant cost to the nation. Where does the nation find remedy against such imperial presidency?[39] What does the expansive reading of congressional control tell us about constitutional checks?[40] In

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35. *Id.* (quoting *Steel Seizure*, 343 U.S. at 637).

36. *See* Ghoshray, *supra* note 17, at 317–23.

37. *Dames & Moore*, 353 U.S. at 669; *see also id.*.

38. *See* Ghoshray, *supra* note 10.

39. Fearful of a President that might declare war as an attempt to gain fame and glory, the original Framers of the Constitution elaborated extensively on this issue. Author David Alder notes the importance of a President's rate of greatness and the correlation of whether or not he engaged in war during his tenure. *See* David Gray Adler, *Presidential Greatness as an Attribute of Warmaking*, 33 PRESIDENTIAL STUD. Q. 466, 466–67 (2003), *available at* http://goliath.ecnext.com/coms2/gi_0199-3281590/Presidential-greatness-as-an-attribute.html

40. Constitutional historian Louis Fisher noted that:

view of these queries, I believe constitutionally mandated contours of presidential power can be found by first identifying the specific factors that shape the fluid spectrum of fluctuating powers of the President.[41] This brings me to the next line of enquiry. What are those factors?

Article II's executive authority allows the President to exert broad executive power.

> "[t]he executive power shall be vested in a President of the United States of America . . . [who will] faithfully execute the Office of the President of the United States, and will to the best of [his or her] ability preserve, protect, and defend the Constitution of the United States. . . . The President shall be Commander in Chief of the Army and Navy of the United States . . . ."[42]

The uncertainty comes from determining those areas in which the President can exert such broad authority and usurp such absolute power. Articulated in the Constitution,[43] traced in the writings of the founding period,[44] and corroborated in the scholarly analyses[45] is the concept of

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> The debates at the Philadelphia convention reveal that the framers were determined to circumscribe the President's authority to take unilateral military actions. The early draft empowered Congress to "make war." Charles Pinckney objected that legislative proceedings "were too slow" for the safety of the country in an emergency, since he expected Congress to meet only once a year. Madison and Elbridge Gerry moved to insert "declare" for "make," leaving to the President "the power to repel sudden attacks." Their motion carried on a vote of 7 to 2. After Rufus King explained that the word "make' would allow the President to conduct war, which was "an Executive function," Connecticut changed its vote and the final tally became 8 to 1.

FISHER, *supra* note 21, at 8.

41. Here I refer to the characteristic of concurrent power between the President and the Congress. I have established that the allocation of such concurrent authority is problematic owing to the fluid spectrum nature of this power. *See* Ghoshray, *supra* note 17. This has also been corroborated by Justice Rehnquist. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

42. U.S. Const. art. II The President must have Congress' approval, because the power to wage war is shared between the President and Congress. *See id.* Congress has the power to declare war under Article I, Section 8. *See* U.S. CONST. art. I. The President is Commander-in-Chief and leads the armed forces under Article II, Section 2. *See* U.S. CONST. art. II, § 2, cl.1.

43. *See supra* note 15.

44. *See supra* note 15.

45. Here I refer to some recent scholarship in which the backers of unlimited presidential war power seek affirmation in the Constitution for legitimacy. *See* Mayer, *supra* note 16, at 44.

exigency.[46] During exigent times, a manipulative president might stake claim to the affirmative grant of the Constitution in exerting absolute monarchical power of war making. This is exactly what the President cited in arguing for broader usurpation of war power in detaining a foreign individual without charging him in *Hamdan v. Rumsfeld.*[47] The President's lawyers argued, "danger falls by international terrorisms as a justification from departing from standard court martial procedures,"[48] while justifying the reasons for Salim Hamdan's several years of detention without charge in response to his affidavit seeking his release.[49]

The government's attempt to exaggerate the security threat to the country provides an example of the very existentialist paradigm that the President is likely to offer. The constitutional issue at the center is to determine whether military exigency grants the President sufficient power to depart from normal proceedings, as exhibited by the way the government initiated the court martial of *Hamdan.* Is there an imperative doctrine that could allow granting total deference, absolute obeisance, to executive war power?[50] The discussions thus far, provide two areas of continuous uncertainty regarding presidential war power. The first, recognizes the indeterminacy surrounding the allocation of power in the concurrent authority of the Congress and the President. The second, traces the limitless consequences of applying the imminent danger doctrine into the presidential war power debate. In the absence of a more pragmatic deterministic principle, these two factors can jeopardize all our existing analyses, including Justice Jackson's tripartite

46. The focus of my work, *Illuminating the Shadows of Constitutional Space: While Tracing the Contours of Presidential War Power*, is to articulate how the imminent danger paradigm can be manipulated and shaped for personal glory and monarchical aspirations of the President. *See* Ghoshray, *supra* note 17. I urge in this article, to understand the dangerous implications of applying imminent danger doctrine rather loosely. *Id.*

47. Hamdan v. Rumsfeld, 548 U.S. 557 (2006); *see also* Saby Ghoshray, Youngstown *to* Hamdan*: Examining the Significance of Article III Court in Shaping Presidential War Power,* 53 WAYNE L. REV. 991, 1009 (2007).

48. *See* Ghoshray, *supra* note 47.

49. *Id.*

50. *Id.* The Supreme Court opinion in *Hamdan* clearly articulates that congressional legislative authorization is a precondition for a broad grant of presidential power. I believe there could be exigencies under which the President could exert such power.

solution of presidential authority. Therefore, delving into a more elaborate study on false consciousness and constitutional curvature may help clarify these two factors.

With a view to understand this shared war power doctrine, I will examine the genesis of this uncertainty by introducing false consciousness. Although not discussed in the existing scholarship, false consciousness offers a greater explanatory power to illuminate some of the uncertain constitutional areas. The existing scholarship in my view does not provide enough clarity towards the asymmetry in delineating between the proper allocations of power in a shared scenario. This uncertainty is further complicated by the imminent danger doctrine.[51] The controlling query therefore seeks the missing paradigm, as it seeks a workable solution to this uncertain constitutional quandary. By understanding the genesis of false consciousness, the finer shades of the imminent danger doctrine for application to presidential power become clearer.

III. GENESIS OF FALSE CONSCIOUSNESS AND THE RELEVANCE TO PRESIDENTIAL POWER

The force fed phenomenon of the War on Terror[52] has indeed jolted the very concept of international law, because, its characteristics are very difficult to fit into a traditional legalistic framework.[53] The War on Terror has shown its ugly manifestation in Guantánamo Bay and Abu Ghraib.[54] But, is

51. *See supra* note 41.

52. As noted in President Bush's biography found on the Wikipedia website, "Bush's presidency has been defined by the ongoing War on Terror following the September 11, 2001 attacks. After the attacks, Bush and the United States Congress created the Department of Homeland Security and increased the powers of law enforcement agencies with the passage of the USA PATRIOT Act." Wikipedia, http://en.wikipedia.org/wiki/George_W._Bush (last visited Aug. 3, 2008).

53. War on Terror is a nebulous concept, a carefully orchestrated hegemonic campaign by the Bush Administration to refute and ignore all norms of International Law. I have analyzed the legal ramifications and international fallouts from this War on Terror at length in a comprehensive work elsewhere. *See*, Saby Ghoshray, *To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 709 (2006).

54. I will argue that the violations in both Guantánamo Bay and Abu Ghraib are not isolated incidents, but are different manifestations of a deep-rooted problem nestled in the American political agenda. In an earlier work I have shown that there exists five primary prongs when taken together can

false consciousness to blame? Let us consider this in further detail.

Consciousness at a preliminary or rudimentary level may be defined as an awareness of the self and the environment. This awareness means an individual is able to react to changes in the self or the environment.[55] In the Hegelian sense, an individual becomes aware of the distinction between one's self and the environment in which the self of the individual engages in a process of discovery. During this process, the individual uses tools from the environment, including "tools of reason,"[56]to interpret the objective world. In this way, the individual objectifies herself by injecting subjectivity into the discovery process, resulting in newer needs and more tools to develop a mastery of the environment.[57] Individual human essence manifests itself by the constant struggle between the inner self and the externally imposed stimuli. The outcome of which is shaped via the machine-like repetition bereft of spontaneity, while alienating the inner consciousness from the individual core.[58] As a result, the spontaneous, free-spirited person loses her

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explain the genesis of these two seemingly isolated events. *See* Saby Ghoshray, Understanding Guantanamo and Abu Ghraib: Looking Through The Prism of American Political Agenda Abroad at The University of Mary Washington Conference: Arrogance of Power: Being American after 9/11 (April 1–3, 2005). These factors are: (1) American agenda of perpetuating an undefined yet expanding concept of evil, (2) perpetual quest for invulnerability, (3) isolationism and faulty multiculturalism post-9/11, (4) policy of exaggeration and (5) dehumanization of the enemy. These factors, coupled with the asymmetric alignment of power in today's world, and lack of political ethics in American foreign policy can very well explain the genesis of Guantánamo Bay and Abu Ghraib. *Id.*

55. By environment, I refer in general the society in which the individual resides. If society can be seen as a collection of individuals, then changes in the self of one individual can signal a change in the environment. Throughout this work, I will use society and environment interchangeably.

56. In Hegelian philosophy, primacy is given to reason, as it is posited on the ability of reason to guide human life. *See* HERBERT MARCUSE, REASON AND REVOLUTION (Oxford University Press 1941). This ability of reason to guide human life centers on the assumption that human processing follows a rational order to be able to distinguish reasonable reality from an unreasonable reality. See *id.* Marcuse believes that, the concept of reason lies at the core of Hegelian philosophy.. *See id.*

57. *See* G.W.F. HEGEL, REASON IN HISTORY 28–31 (R.S. Hartmann, trans., 1953).

58. Throughout this discourse, I use "man" to represent humans or humanity. I use the term "her" or "she" to avoid any unintended sexist or chauvinist connection of individual humanity.

inherent consciousness, as that consciousness becomes only a means to continue the machine-like work.

In this construct, an individual regresses from the free-spirited human to a machine-like worker. Her environment in which she operates becomes identified with the need for production and the free thought process is suppressed by the newly imposed false consciousness. Therefore, false consciousness is a version of the collective consciousness borne out of externally imposed or artificially created realities designed by the controlling system. This false consciousness is injected into the subjective core of the individual such that these needs become true needs into the consciousness of the said individual. When the individual is stripped of inherent internal history and the society is reasonably symmetric, this injection process becomes much more efficient, effective, and relatively everlasting. The efficacy of this process lies in the fact that these false needs overcome the resistance from inherent individual tendencies of self-gratification and self-determination, and thereby are able to bypass the more subjective human essence.

False consciousness is shaped by subjective rationality within an environment controlled by mass symmetry and manipulation of history. The monolithic tendency of an individual within a symmetric social order mimics that of the march of lambs to the slaughterhouse. Robot-like, their collective needs to proceed forward are driven by an artificially created rationality. Individuals under the influence of a dominating power, whose societal needs have been carefully designed and sublimated into its deeper consciousness, suffer from the effects of bounded rationality.

In this existence, the individual rationalizes not only her false needs, but also her requirement of symmetry within the environment, in such a way that rationality cannot extend the artificial barrier imposed upon her current consciousness. This distorted rationality is therefore a vital ingredient in perpetuating the de-humanization process that today's un-liberated individual experiences. If conforming to symmetry and restricting oneself to bounded rationality[59] lie at the core

59. In one of my forthcoming work, I define bounded rationality as a rationality that is borne not out of the individual's innate subjectivity but originates via a flawed process of distorted subjectivity and is infected with false

of developing false consciousness, then domination and repression can be identified as the other two inter-related phenomena that need a twenty-first century reinterpretation. A substantive discussion is beyond the scope of our present discourse but can be accessed from my work elsewhere.[60]

In view of the above paradigm, let us consider this: If false consciousness is seen as a distorted form created by the political process and imposed upon the whole society, how then, can this be regarded as true consciousness of society? This is important in our current analysis. It is important to provide a diverging prism of understanding towards some of the major political events, such as, America's War on Terror.[61] By perpetuating a distorted or false rationality via interjecting false needs on society, the propagation of false consciousness grows.[62] There exist several categories of false

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needs. Bounded rationality germinates when the true consciousness of an individual remains on hiatus as the individual goes through a dialectic labor process to interact with her environment, the newer, distorted consciousness becomes the instantaneous consciousness, which is thus alienated from the true consciousness. In this existence, the individual rationalizes not only her false needs but also her requirement of symmetry within her environment, in such a way that rationality cannot extend the artificial barrier imposed upon her current consciousness. This distorted rationality is therefore a vital ingredient in perpetuating the repression of consciousness within an un-liberated individual and can be characterized as bounded rationality. In this context, repressed consciousness is the state of mind in which an individual forcibly represses her own sense of reality in order to better deal with her environment. This is borne out of the monolithic tendency of an individual with a symmetric social order, in which the collective needs of all such individuals to proceed forward is driven by an artificially created rationality. Therefore, the bounded rationality I refer to can be understood through a Marcusean framework that connect bounded rationality with false consciousness, domination and repression and therefore theoretically differs from Simon's bounded rationality. *See* Ghoshray, *supra* note 22.

60. *Id.*

61. Earlier I mentioned that the War on Terror is a nebulous concept designed to advance an unmitigated agenda of imperialism and unilateralism. I would contend further that War on Terror under the current Bush administration is not only restricted to aggressive wars against sovereign nations, human rights abuses in Guantánamo Bay and Abu Ghraib, but also is seen in domestic curtailment of individual liberty and privacy rights. Professor Douglas Kellner in his article, *September 11 and Terror War: The Bush Legacy and the Risks of Unilateralism*, presents somewhat of a comprehensive dimensionality of the War on Terror. DOUGLAS KELLNER, SEPTEMBER 11 AND TERROR WAR: THE BUSH LEGACY AND THE RISKS OF UNILATERALISM (2003), *available at* http://www.gseis.ucla.edu/faculty/kellner/papers/sept11kell.htm.

62. I argue that false needs in conjunction with other societal forces give rise to false consciousness. However, there exist some controversies in the

consciousness. Such categories include alienated consciousness or repressed consciousness, all of which go through some form of struggle to either attain or mimic true consciousness. The different dimensions of false consciousness are not central to our discussion.[63] But an understanding of the central tenets of false consciousness is significant in developing the framework toward a better understanding of the imminent danger doctrine.

The difficulty arises when the controlling power of the presidency eliminates dissent by using consumerism as leverage and creates a false consciousness out of illusionary realities. In the case of Iraq, this leverage was created by inflating the concept of liberty, along with constant bombardment of the illusionary realities of the impending mass destruction at the hands of Iraq. Since false consciousness cannot distinguish between true reality and illusionary reality, it creates a fertile ground on which a manipulative executive can build his case for an imminent danger doctrine. The debilitating fear that gripped America after 9/11, allowed the government to inject an illusionary ambience of vulnerability, which paved the way for virtual abrogation of civil liberties in various fronts.

With its imposition of the USA Patriot Act,[64] the government allowed unchecked surveillance powers to law enforcement officials to peer into suspected individual's most private readings, research and communications.[65] The Act's

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conceptual distinction between false and true needs. I would concede therefore, that as the anthropological concept of "needs" become crystallized the degree of causality between false needs and false consciousness might change. However, I feel strongly that notwithstanding the evolution of our understanding of "needs," the qualitative causality between false needs and false consciousness will remain a stronger one. For my present discourse, I equate false needs as a "commodity fetishism" as described by Professor Kellner in his book. *See* DOUGLAS KELLNER, HERBERT MARCUSE AND THE CRISIS OF MARXISM 447 (1989).

63. I have detailed the different dimensions on false consciousness, its genesis and its broader impact on society. *See* Ghoshray, *supra* note 22.

64. *See generally* USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act]. The Patriot Act was created, "[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes." *Id.*

65. *Id.* In an earlier work, I have highlighted the many significant flaws of the USA Patriot Act. These flaws threaten the citizen's fundamental freedom by not only providing the government with detailed information related to individual, medical and tax records but also granting unfettered power to break

provisions not only violated the free expression and privacy rights of those using public libraries and bookstores, but also swept aside constitutional checks and balances by authorizing intelligence agencies to gather information in situations that may be completely unconnected to potential criminal proceedings. It is indeed true that a tumultuous post-9/11 world has necessitated a certain amount of surveillance to thwart potential terrorist attacks, but the sweeping measures by the government were a naked exuberance of the controlling authority over its citizenry. Unfortunately, governmental excesses in curbing various individual rights, such as, civil liberty, privacy rights and free expression, were somewhat sanitized by the false consciousness reigning among the masses within the nation. This symmetry of the collective consciousness and its inability to challenge intrusion to rights is a dangerous sign of society's deeper dive into debilitating fear. At the heart of this state of mind lies the symmetrization of the individuals in attaining a false sense of vulnerability by applying a distorted bounded rationality to both propagate and seek solutions for irrational fear.

How does this false consciousness influence congressional inertia or legislative indifference? This question is important because this false consciousness influence eventually would permeate into the constitutional space where the implied authority of the President becomes significant. I intend to address this very question by analyzing three important threads. The first, examines how false consciousness

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into people's private dwellings to conduct secret searches. *See* generally, Ghoshray, *supra* note 3. The expansive provisions of the USA Patriot Act allows for the government to eavesdrop on all electronic and wireless communication, to arrest individuals without specific charges, to hold them indefinitely, to monitor conversations between lawyer and client, as well as to carry out secret military trials of suspected terrorists. *See* John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1083, 1126 (2002). *See* Marc Cooper, *Uncensored Gore,* L.A. WEEKLY, Nov. 13, 2003, *available at* http://www.laweekly.com/general/features/uncensored-gore/2233; *see also* CHARLES DOYLE, ,CRS REPORT FOR CONGRESS: THE USA PATRIOT ACT: A LEGAL ANALYSIS 51–52 (2002), *available at* http://www.fas.org/irp/crs/RL31377.pdf; Andrew Ayers, *UN Reports: The Financial Action Task Force: The War on Terrorism Will Not be Fought on the Battlefield*, 18 N.Y.L. SCH. J. HUM. RTS. 449, 458 (2002).

accentuates presidential authority by broadening the scope of presidential power. The second examines how the existing linear space of legal reasoning is inadequate to explain the phenomena of presidential usurpation of absolute war power. The third examines how the concept of implied power must be seen through a separate framework than that discussed in the existing scholarship.[66]

IV. CAN FALSE CONSCIOUSNESS EXPLAIN THE ASYMMETRIC SHARED WAR POWER PARADIGM?

Justice Jackson held that when congressional authority is available, presidential power is at its maximum. Justice Jackson's analysis did not contemplate calling for an examination of implied presidential authority under the imminent danger doctrine.

At this juncture, it is important to carefully delineate the two scenarios under which assertion of maximum presidential power can occur. The first scenario, illuminated by Justice Jackson, identified the condition that could raise the limits of presidential power to its highest peak. The second scenario refers to the false conditions under which president's power can be implied under the false pretext of imminent danger. While the former is real, the latter is illusionary, shaped by the false reality of an impending danger. This should be characterized as implied presidential authority, as it does not have the Constitution's affirmative grant. Rather it is manufactured by invoking imminent danger from the administrative process of injecting false consciousness into the national psyche. The Bush Administration within this construct creates a fertile ground for deriving maximum implied presidential authority by clever manipulation of available stimuli. This could be achieved two scenarios. First, when Congress becomes indifferent to the presidential aspirations and refrains from legislative enactment to

66. Departing from the existing doctrinal analysis of presidential power, I characterize presidential power under two scenarios, derived power and implied power. Derived power can be seen from the constitutional determination of the events and actions that grant the President his war power. Implied power can be understood as the power that the President exerts on the basis of events or phenomena that the Constitution cannot explain. Therefore, if the President imposes war power on the basis of manipulative information or by injecting illusionary realities into the nation, this can be considered as implied power.

formalize the declaration of war, the President is emboldened by lack of legislative enactment. Second, when the public's perception accentuates its fear, the idea of imminent danger[67] gives the President the opportunity to exert war power under the Take Care Clause of the Constitution.[68] The driver in this scenario is the people's perception of imminent danger. The illusionary danger is given shape by the false consciousness, driven home to the masses by the governmental manipulation. How does this false consciousness take effect? I shall detail below the layered process through which the false consciousness gets entrenched.

Perpetuation of the fuzzy concept of evil has been a necessary ingredient of American foreign policy. The framework supporting the concept of evil may be unstable on the surface, but it is incumbent upon us to understand the genesis of the theory of evil within the context of the Iraq War. While it is difficult to develop a prima facie connection between the genesis of evil with the development of false consciousness, they can indeed be interrelated. By analyzing the preconditions that brought the war in Iraq, it is easier to see how the theory of evil relates to false consciousness. The concept of evil has long been a staple for politicians and U.S. Administration. One need not look far to find the supporting evidence. During the cold war, the former Soviet Union used to be chastised as the evil.[69] Saddam Hussein used to be compared with Hitler during the Gulf War and was demonized up until his hanging.[70] During the Clinton

67. *See* Ghoshray, *supra* note 17.

68. The Take Care Clause is technically listed as Article 2 Section 3. It states:

> He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

U.S. CONST. art. II, § 3.

69. *See* President Reagan, Speech to the House of Commons, (June 8, 1982), *available at* http://www.fordham.edu/halsall/mod/1982reagan1.html.

70. *See* John Diamond, *Some Analysts Questioning U.S. Policy of Demonizing Saddam*, ASSOCIATED PRESS, Nov. 29, 1997, *available at* http://www.hartford-hwp.com/archives/45/224.html.

Presidency, the bombing of Serbia necessitated the creation of a new face of evil[71] in the form of Slobodan Milosevic. The recent focus on Osama Bin Laden is his incarnation as the manifestation of evil. This focus however, almost never divulges the forgotten part of history that Osama Bin Laden fought with U.S. troops to drive out the evil Soviet Empire from Afghanistan. This is the concept of evil that has craftily been injected into the collective consciousness of the nation.

Once the personification of evil is complete, the framework of liberating the populace from the clutches of those evil leaders and evil dictators becomes more efficient. It then becomes the sacred duty of the U.S. government to liberate American citizens and other citizens of the world from such evil leaders; whether it is by carpet-bombing or surgical strikes by cruise missiles[72] is irrelevant. Whatever the ends, a rationale can be created to justify the means.[73] It is now very easy to understand how this framework can create a distorted sense of reality by giving the appearance that the American military action is not only being divinely inspired, but it is placing the righteous masses against the solitary figure of evil. Under this very convenient scenario, the governmental machinery wants the masses to believe that this world would be a much safer place, wherever the American-styled "freedom" could be imported.[74] Except for

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71. *See* Louis Proyect, *The Demonization and Death of Slobodan Milosevic*, SWANS COMMENT., Mar. 27, 2006, http://www.swans.com/library/art12/lproy35.html.

72. The scenario of overcrowded hospitals with injured children gives only a snapshot of the widespread destruction that includes extensive civilian casualties from cluster bombs, deformed babies resulting from U.S. depleted uranium, and bustling markets leveled to rubbles from high-altitude bombings. As the evidence of this brutal occupation percolates and more and more reports verifying civilian abuses, civilian infrastructure destruction, and innocent killing of civilian by the occupying forces, the desire to flatten Iraq is apparent. *See* Ghoshray, *supra* note 10.

73. *See id.*

74. Consider an alternative perspective on freedom:

> Foreign observers have often been bemused, to put it politely, by Americans' refusal to consider that other people may have thought about freedom and arrived at conclusions that might be worthy of consideration. When Alexis de Tocqueville visited the United States in the 1830's, he was struck by Americans' conviction that "they are the only religious, enlightened, and free people," and "form a species apart from the rest of the human race.

See Eric Foner, *Not All Freedom Is Made in America*, N. Y. TIMES, Apr. 13, 2003, § 4 (Week in Review Desk), at 2, *available at*

only one or two individuals in the world, it is becoming impossible to distribute that American-style freedom to all. Also, the list of evil doers is never replete, but rather increases. Various presidents invoking military responses to any perceived belligerent actions or behaviors by the leaders of Nicaragua, Iran, and North Korea to name a few are examples of this phenomenon. Therefore, by declaring certain individuals evil, the President is developing a rationale to continue this flawed policy, by first injecting the false rationality of retaining liberty by propagating organized violence. The question that perhaps the President cannot answer, is how some solitary individuals could become the sole destroyers of American liberty, unless it is in reality fragile to begin with.

Therefore, the perpetual drive for American peace is only one or two assassinations away. But would Congress give the President such power to order the murder of a Head of State?[75] Odds are no. So, what is the solution, when the national consciousness is enveloped with debilitating fear of destruction by evil forces? Can then, the President unleash the dogs of war?[76] Is he justified to bomb cities into oblivion

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http://query.nytimes.com/gst/fullpage.html?res=9507EED7153BF930A25757C0A9659C8B63&scp=1&sq=&st=nyt.

75. The assassination of foreign Head's of States has been a dark little secret politician and military leaders have contemplated. Whether it was Fidel Castro or Saddam Hussein, assassination has been a legitimate consideration. Consider the President's spokesman Ari Fleischer's comments:

> Asked about the estimated $9 billion-a-month price tag for a war against Iraq, the presidential spokesman replied: "The cost of a one-way ticket is substantially less than that. The cost of one bullet, if the Iraqi people take it on themselves, is substantially less than that." Repeatedly prodded by reporters over whether he was calling for the murder of Iraqi President Saddam Hussein, Fleischer did not budge from his statement, declaring only that "regime change" remained Bush's objective and that there existed "many options" to carry that out.

Bill Vann, *Bush White House Embraces Assassination*, Oct. 3, 2002, http://www.wsws.org/articles/2002/oct2002/bush-o03.shtml.

76. WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 3, sc. 1, (1599) *available at* http://www.opensourceshakespeare.com/search/search-results.php. In his monologue he proclaims only destruction and death will come on the heels of Caesar's death. *Id.*

> And Caesar's spirit, ranging for revenge,
> With Ate by his side come hot from hell,
> Shall in these confines with a monarch's voice
> Cry 'Havoc,' and let slip the dogs of war;
> That this foul deed shall smell above the earth

in pursuit of one evil leader?[77] Can he obliterate civilizations back to their prehistoric states[78] and then force-feed them another illusionary reality of democracy, liberty, and freedom?[79]

Let us consider this further. Is it just a matter of selecting the right personification of evil and bombing the right city? Is it likened to the forces of light and good expunging from the earth the forces of darkness and bad?[80]The truth is however, much more complex. By designating a country as an "Axis of Evil"[81] or "Evil Empire"[82] the process of injecting illusionary realities, combined with the phenomena of false consciousness, begin to take shape by embracing the concept of evil.

How did embracing the concept of evil become so easy?

With carrion men, groaning for burial!

77. Such overwhelming destruction by U.S. forces has been witnessed on many fronts. One prime example is the destruction showered on the city of Fallujah during November of 2004. Video footage of defenseless Iraqi prisoners being shot in cold-blood, rampant allegations of deliberate targeting of civilians, the lack of humanitarian and medical aid, indiscriminate bombarding of civilian houses, and the use of banned incendiary chemical weapons remained out of the reporting by mainstream media and humanitarian sources during the initial stages of the war. *See* Dahr Jamail, *'Unusual Weapons' Used in Fallujah*, Nov. 26, 2004, http://www.dahrjamailiraq.com/hard_news/archives/2004_11_21.php; *see also* Peter Popham, *U.S. Forces 'Used Chemical Weapons' During Assault on City of Fallujah*, THE INDEPENDENT, Nov. 8, 2005, at 26, *available at* http://news.independent.co.uk/world/middle_east/article325560.ece; Information Clearing House, U.S. Used Chemical Weapons in Iraq Veteran Admits: Bodies Melted Away Before Us Nov. 7, 2005, http://www.informationclearinghouse.info/article10901.htm; see also Democracy Now , Fallujah: The Hidden Massacre on the U.S. use of Napalm like White Phosphorous Bombs, Nov. 8, 2005, http://www.democracynow.org/article.pl?sid=05/11/08/1516227 (featuring interviews with U.S. Soldiers, Iraqi Doctors and International Journalist on the U.S. attack on Fallujah).

78. *See* Ghoshray, *supra* note 10.

79. *See supra* note 76.

80. *See* Jude Wanniski, *John Bolton, Force of Darkness: Memo to: Richard Lugar, chairman, Senate Foreign Relations Committee*, May 9, 2005, http://antiwar.com/wanniski/?articleid=5877.

81. The phrase, 'axis of evil' was made famous in the State of the Union Address on January 29, 2002. President Bush, State of the Union Address (Jan. 29, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html. President Bush described three nations, Iraq, Iran and North Korea as governments who sponsored terrorism and were interested in possessing weapons of mass destruction. *Id.*

82. *See supra* note 22.

What are the factors that create a fertile ground for the concept of evil to impregnate the collective consciousness of the masses? There are two distinct threads that run parallel in the development of U.S. foreign policy. First, there is the sense of vulnerability and the second is the issue of isolationism.

With the development of newer technologies comes the increased possibility of threats. One such threat being Al-Qaeda's weapons of mass destruction coming to the shores of America.[83] The sense of America's vulnerability has been a common theme shaping its foreign policy since the days of the cold war.[84] This sense of vulnerability is random in nature, but easily captures American hearts and minds with selective invocation and active persuasions from politicians. This selective nature unfolds with each new foreign policy crisis. The randomness however, reveals a manipulative pattern. The Bush Administration reaches deep within its foreign policy repository and infects the national consciousness with the urgency of a renewed sense of vulnerability. The collective masses are reminded of evil that must be conquered. Once the masses are injected with the false reality of this evil, it becomes easier to manipulate the law to impose war power-like authority on U.S citizens. The sustainability of a/the logical framework of the argument, however, cannot be sustained with these observations. Can the self-proclaimed leader of the free world remain vulnerable from threats to its security? If this is indeed the case, can the security be enhanced by shrinking liberty contemporaneously? I do not want to delve into the false dichotomy of the security-liberty duality at this juncture, as this is area I have examined in great detail elsewhere.[85]

The problem of vulnerability has provoked a mad quest for invulnerability. This quest for invulnerability periodically resurfaces under diverging scenarios during various

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83. *See* Ben Friedman, *THE WAR ON HYPE: Risk to U.S. of Withering Terrorist Hit is Overblown*, S.F. CHRON., Feb. 19, 2006, at E1, *available at* http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/02/19/INGDDH8E2T1.DTL&type=printable.

84. *See* Brett Ashley Leeds & David R. Davis, *Domestic Political Vulnerability and International Disputes*, 41 J. OF CONFLICT RESOL. 814 (1997), *available at* http://jcr.sagepub.com/cgi/content/abstract/41/6/814.

85. *See generally* Ghoshray, *supra* note 3.

regimes.[86] Recent past reminds us of the compelling argument for a missile defense shield during Reagan's "Star Wars" days, which is akin to the more recent proposals for a National Missile Defense from Bush.[87] This quest for invulnerability has been one of the driving forces to continually develop the concept of evil and has prompted the imperial President to embark on a scorched earth policy of universal declaration of war against terrorism.[88]

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86. Here I refer to the different emergency plans American citizens have undergone over the years to protect themselves from attacks they fear could come on the domestic United States. Such examples include a history of urging citizens to build and stock underground bunkers to survive nuclear weapons, as well as U.S. children practicing hiding under school tables in nuclear weapon drills, and to the current practice of U.S. citizens asked to be vigilant and provide appropriate agents information about possible attacks or questionable behavior, to preparing to survive weapons of mass destruction attacks or a dirty bomb attack. Consider these measures:

> There was a family sized fallout shelter on display there that we took a salesman's demonstration tour of. It was a cement block, above ground bunker that was smaller inside than our living room. It had a little hand crank air intake filter that I thought was really neat. There were suggested supplies, in there, that should be stored in one, like board games, books, food and water.... During my elementary school days, we had monthly air raid drills in school. The first few years, we students had to craw up into a ball under our desks. That was the best protection if bombs and roofs began falling down all around you.

See David Robert Crews, *Nuclear War Fears*, MAGIC MORNING STAR, May 9, 2006, http://www.magic-city-news.com/D_R_Crews_84/Nuclear_War_Fears_57975797.shtml.

87. *See* Press Release, President Bush, Remarks on National Defense to the Media, (December 13, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/12/20011213-4.html.

88. An understanding of the scope and implication of this concept of evil is a necessary ingredient in American foreign policy. Historically, the concept of evil has been the staple for politicians and the U.S. Administration. We don't need to look far to find the supporting evidence. During the Cold War, the former Soviet Union used to be chastised as the "Evil Soviet Empire." *See* Editorial, *To the Summit, and Beyond*, N.Y. TIMES, Sept. 20, 1987, § 4, at 26, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B0DEED71030F933A1575AC0A961948260&scp=1&sq=&st=nyt. Saddam Hussein used to be compared with Hitler during Gulf War I. *See* Mary McGrory, Editorial, *Bush Needs to Hone Foreign Policy Skills*, SEATTLE POST-INTELLIGENCER, June 16, 1992, at A11. When President Clinton was dodging and weaving from his Monica Lewinsky woes, suddenly Slobodan Milosevic was the news distraction, with the mainstream media running articles like "the new face of evil." *See* M. Gregg Bloche, Op-Ed., *War Crimes, for Milosevic, to Win is to Lose*, L.A. TIMES, Aug. 26, 2001, at M6. Further, Osama Bin Laden has been the manifestation of pure evil for almost a decade. Forgotten is that Osama Bin Laden worked alongside the U.S. Special Operations in Afghanistan to drive out the evil Soviet Empire. While the players and the theaters of operation may have changed, the concept

The mad quest for invulnerability invites a very typical response to deal with the conditions that produced the threat of vulnerability. Tracing the historical trends in American foreign policy, I broadly characterize one of these conditions as "isolationism" which can be synonymously used as "insularity."[89] The term isolationism can convey a very different meaning in the domestic framework. This is because, initially it was a reflection of systemic disenfranchisement, and hence became a very loaded term. But my goal here is not to engage in an academic debate over the genesis of the term. Rather, I use the term "isolationism" to reflect the perceived gap between Americans and the rest of the world, as we endeavor to search for the roots of this gap. Isolationism can therefore be seen as a frame of mind, rather than a systemic policy of disenfranchisement. Thus, the connotation is more cultural than political. It seems that the cultural attitude of Americans is shaped by their political expression of how to interact with the world outside of American borders. This in turn creates the ideal precondition for false consciousness to germinate.

Literature is replete with references, and media has carefully crafted the image that, "America is a world unto itself."[90] Even though advancement of technology has

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of evil has not. In a lecture I discussed this concept of evil and quest for invulnerability by Americans. *See* Ghoshray, *supra* note 54.

89. Here I use the term "isolationism" synonymously with "insularity." Now, delving into the archives of recent history, we will see there are huge difficulties with the term "isolationism" because it was used initially as a reflection of systemic disenfranchisement, and hence became a very loaded term. But our goal here is not to engage in an academic debate over the genesis of the term. Therefore, in this discourse, I use the term "isolationism" to reflect the perceived gap between America and the World, as we endeavor to search for the roots of this gap. Hence, I want to focus on isolationism as a frame of mind, rather than a policy. The isolationism that I am going to talk about is more cultural than political. In a way, it could be seen as cultural attitude of Americans shaping their political expression of how to interact with the world outside of America. *See* Ghoshray, *supra* note 3.

90. This idea of American isolationism has been evident in politics, policies and even trickled down to the common citizen that imbibes a narrow or limited knowledge of the existence beyond the domestic U.S. boundaries. Consider such isolationism:

> The conclusion must be that Americans simply don't understand the world. Partly this is to do with the sheer size of US power. America is a world unto itself and tends to see everything as a reflection of itself. But at least another part of the problem, in Vietnam and Iraq, is cognitive dissonance: a serious lack of understanding of other cultures

narrowed the divide between the United States and the rest of the world, America has become both a very *involved, yet surprisingly aloof nation* as it relates to international affairs. This isolationist viewpoint, therefore, not only accentuates America's sense of vulnerability, but also provides a snapshot of the national collective consciousness. In return, this has created a pristine fertile ground for the perpetuation of the concept of evil I detailed above.

The framework defined by isolationism, the quest for invulnerability and the resulting false consciousness creates an interesting prism to recognize how the governmental machinery is able to forge a unique relationship with its citizens. Because, even in a democratic system like the U.S., it will not be prudent to assume that the U.S. government's actions are simply the expression of the will of the people. So, what does the government do when there is a perceptible gap between public opinion and government policy? The government engages in extensive public relations exercise to close this gap. This public relations campaign was brilliantly executed during the months leading to the invasion of Iraq.[91] We witnessed the government exaggerate the emphasis on vulnerability in order to get backing from the American people for a War it knew was both suspect and unpopular in some quarters.[92]

Finally, I have established the importance of the evil nature of the enemy. I have established the rationale for the quest for invulnerability. I have shown the fertile ground in

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(and that occasionally includes Australia).
Paul Dibb, *America - a World unto Itself*, ON LINE OPINION (2007), http://www.onlineopinion.com.au/view.asp?article=5428.

91. Statistics and polls prior to America sending troops to Iraq, revealed the unshakeable belief of the American public's duty toward invading Iraq to find weapons of mass destruction. *See* U.S. INFO. AGENCY OFFICE OF RESEARCH AND MEDIA REACTION, OPINION ANALYSIS: U.S. PUBLIC VIEWS MILITARY STRIKES AGAINST IRAQ (1998), http://www.fas.org/news/iraq/1998/02/11/opinion.htm#N_2_. Leading up to the war, and during the initial stages, it was believed by many in the public that there were dangerous weapons of mass destruction available to the leadership of Iraq that could land on American domestic soil. *Id.* The polls reflect this mindset. *Id.* Now, several years since bombing Iraq, toppling and capturing Saddam Hussein, and no weapons of mass destruction have been uncovered. *Id.* This has raised serious questions regarding U.S. administrations public campaign of manipulating public opinion polls vis-à-vis the looming Damocles Sword of weapons of mass destruction.

92. *Id.*

which the insularity from the world's view, germinates the public opinion based on fear, which is compounded by a heightened sense of vulnerability. With these ripe preconditions germinating, the false consciousness behind the policy of imminent danger takes root. These are what the President needs to manipulate the Constitution to extract an affirmative grant to impose war on a nation. Can the existing constitutional paradigm handle this? Are there crevices within the deeply complex valleys and heights of the Constitution that are not illuminated by the light of legal reasoning existing today? Is it possible to reach the most prudent legal outcome given the scenario I presented above?

V. TRACING THE CONTOURS OF A NEW LEGAL PARADIGM IN THE CONSTITUTIONAL CURVATURE

Let us now step away from the adjudicatory quandaries of law that revolves around whether Congress has more control, or the President is endowed with a higher quantum of affirmative grants from the Congress. The discussion above points to a more fundamental disconnect in legal reasoning methods available to us. The President as the executive has the duty to take care of the citizens and protect the nation from imminent danger by staying within the constitutionally mandated authorities vested upon him. Congress, on the other hand, must be both vigilant and cognizant about the dynamics between the President and the citizens and intervene if necessary by enacting legislation. Conceptually, this leads us to believe that a series of events should develop the framework for the foundation to engage in legal reasoning.

Legal reasoning is the process that navigates through the maze of constitutional grants and provisions to determine the mandated outcome. Let us capture the framework in the following scenarios. I begin with a hypothetical scenario to describe a set of preconditions and present a legal reasoning based approach to identify the most feasible legal outcome. For clarity's sake, the scenarios described are simple illustrations to recognize how the legal responses could become complex and indeterminate under the existing legal paradigm.

A. Scenario 1: Diplomatic Negotiation

If the threat to national security can be modeled as a set S_1 containing a basket of discrete and identifiable events, *a, b, c,* such that, $S_1 = (a, b, c)$. The variables are defined as follows:

a = Nuclear bomb threat from Iraq
b = Impending oil shortage
c = Imposition of theocracy in Iraq

If we further assume that, any one of the events can trigger the security threat S_1, then let us engage in an analysis to determine how the legal reasoning process may unfold.

Here legal reasoning involves a mechanism that takes as input the set S_1, and provides as output the set of possible legal outcomes, C_1. Constitutional interpretation must generate the output set C_1, such that, any element belonging to this set must be a legally permissible manifestation of presidential power. If we assume, C_1 contains a set of discrete and identifiable responses, represented by variables, *i, j, k, l.* The variables are defined as follows:

i = Invasion of Iraq
j = Diplomatic negotiation (C_1)
k = *Imposition of United Nation sanction*
l = Selective bombing of nuclear sites

Constitutional interpretation enables the legal reasoning process to generate a set containing all possible presidential responses characterized by $R = (i, j, k)$. Legal reasoning, thus, filters through all responses to determine the constitutionally sanitized response to the initial series of events.[93] Or, simply

93. In reference to the Newtonian design of the Constitution, I am reminded of Michael Kammen's observation that the Framers intended to build "a machine that would go of itself." *See generally*, MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (St. Martin's Press 1994) (1986). The Constitution during the Founding period was thought to be such a machine, perpetually in motion, balanced by the forces and counterpoised forces. *Id.* I would argue here that during the Founding period, there were no other scientific theory other than Newton's theory of celestial motion that governed the movement of objects in time and space. Since there was no known scientific alternative to Newton's theory that did a better job of explaining physical movement, the Framers' reliance on Newtonian design is

stated, it is the opposite reaction to an initial reaction.[94] If we assume, further, that reason presents us with the most feasible legal outcome C_1, characterized by $C_1 = j$, where the constitutionally validated set of responses C_1 is a subset of R_1.

As we can see above, variables i and k are not part of the set C_1. This indicates that the sequence of events within the existing legal reasoning does not support either invasion of Iraq or bombing of nuclear sites as constitutionally mandated responses. This leaves us with diplomatic negotiation as the only possible legal outcome. Now, I shall shock the system to change the framework slightly and arrive at the next scenario.

B. Scenario 2: War with Iraq

Let us shock the system a bit and introduce a new set $S_2 = (a, b, c, e)$, where the variables a, b, c, remain the same as before and the new variable e can be defined as follows:

e = Possibility of Iraq possessing enriched plutonium to manufacture crude form of nuclear weapons.

How does this existence of element e in the set S_2 alter the set C_1? The issue is to identify whether the added event produces any incremental power for the President, which could expand the limits of his or her war power, by allowing the Commander-in-Chief to order troops into war. Although the constitutional history since the World War II (WWII) and the Civil War provides evidence of the President imposing war on the nation, the Constitution does not allow the President to exercise enhanced war power, even under the new scenario.

Under this scenario, the President has the implicit power to exert war power under the broader provisions of Article II, albeit, with the formalized declaration of war via Congressional authorization. According to professor Louis Fisher, the decision to thrust the nation into war must be a matter of collective judgment by both the Congress and the

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well understood.

94. This is enshrined in Newtonian theory. That to every action, there exists an equal and opposite reaction. Although, superseded by Albert Einstein's theory of relativity, Newtonian mechanics still form the backbone of basic physics teaching.

President. President can invoke his power of the Commander-in-Chief only after Congress has authorized military action after having considered all pros and cons through painstaking parliamentary deliberations.[95]

The President indeed has some legitimacy in a broader usurpation of power under the real threat of national security as I have shown elsewhere.[96] To continue with my framework here, suppose we change the current scenario from possible nuclear threat from a country hostile to the U.S. to a scenario of an international attack on a U.S. military interest abroad represented by the following variable changes:

The new set $S_3 = (a, b, c, e)$ presents another version of the security threat introduced earlier, where e = Iraq bombed an American warship in the Persian Gulf, while the other variables remain unchanged. The set $C_1 = j$ transitions into $C_2 = i$, such that the constitutional interpretation embarks on yet another iteration of legal reasoning.

The exigent circumstance above does not expand the implied power of the President as Commander-in-Chief. The issue really is to identify when and under what circumstances the President can act upon those powers granted to him by the Constitution, which remains the same as in the earlier scenario: only after the Congress has given the approval. Therefore, the issue changes to an understanding of the factors that may influence the Congress into granting President the needed approval.

C. Scenario 3: Military Invasion

With reference to the framework presented above, if I now alter the set of preconditions to $S_3 = (a, b, f)$ where f = emergence of new landscape of fear. The genesis of this fear can be further isolated as $f = F(E_E)$, such that the perceived fear is a function of executive excess under the characterization E_E = executive excess. This is a scenario in which the government inflates the precondition by using its power of propaganda. In this case, *f (fear)* is not explicitly framed within the Constitution to elicit any legal response. Thus, this landscape of fear could not be asserted as a

95. *See* Louis Fisher, Presidential War Powers, University of Press, Kansas, (2004)

96. *See* Ghoshray, *supra* note 17.

precondition for military invasion, despite the fact that the President may get the benefit of the doubt for imposing war on its citizens in highly exigent situations. Regardless of how we interpret the existing stimuli and possible legal outcome, the cloud of subjectivity and the uncertainty of legal reasoning is implicit in this example.

D. Scenario 4: False Consciousness

Changing the condition further to create a newer set for the precondition of war, let us assume the set to become $S_4 = (F_C, E_E)$, where the new stimulus introduced is F_C = development of false consciousness within the collective psyche of the nation. How does the legal paradigm engage in a legal determination of a constitutionally sanitized outcome? I have previously shown how insertion of new stimuli into the system could have an immediate impact by allowing the level of fear to reach an alarming level. This alarming level was actually witnessed in the days prior to the U.S. invasion of Iraq.[97] Although not constitutionally mandated, the situation indeed provides the President with the implied authorization to exert his war power. Regardless, neither F_C nor E_E can be adequately captured within the existing rule-based legal formalism. This raises the question of whether every complex scenario of today can be adequately captured for determinacy within the current legal paradigm.

The set of scenarios presented above provide an intriguing set of possibilities. What if there are factors and stimuli that cannot be adequately adjudicated for a possible legal response within the existing legal paradigm? In other words, based on all available information and even under the most evolving dynamic constitutional interpretation[98] of scenarios, what if there remains the possibility that we may not have a legal outcome? What then? The scenarios presented above clearly expose the impact of false consciousness. They also strongly indicate a distortion of existing constitutional space. The full scope and multitude of this distortion is yet unknown, and deserves further investigation.

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97. I have discussed this concept of fear in detail. *See* Ghoshray, *supra* note 22.

98. *See* Ghoshray, *supra* note 53.

E. Geometry of the Constitutional Space

Constitutional space is envisaged to be a linear multi-dimensional space[99] in which the distance between the information set[100] and the solution set[101] is constructed via the Euclidean geometric[102] set of straight lines. The contours of this constitutional space is created by the statutes and texts created under the assumption by the Framers that all possible abuses of power at the highest level had been considered with due incorporation of relevant checks and balances. That the Framers envisioned a constitutional space containing Newtonian references of physical characteristics is evident in their exclusive invocation of forces and counter forces.[103] Under this Newtonian framework, the Constitution ought to be assumed as a discrete multi-dimensional space, providing the necessary checks and balances under a linearly applicable force in nature. Within this framework, the forces and counter forces would be applied[104] to the presidential exertion of war power, and the operating control requirement would be applied to Congressional oversight.[105]

Reminding ourselves that the shortest distance between two points is assumed to be a straight line, the controlling assumption is that, the existing legal paradigm can fully evaluate the outcome of a legal scenario. The legal reasoning

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99. According to the basic mechanistic view of the universe, space is conceptualized as formed by linearly placed multi-dimensional space. The Framers expressed themselves appropriately in accordance to the prevailing conception of scientific paradigm of their time.

100. Here I bring in the concept that along a multi-dimensional spatial enclosure, the objects move along straight lines. The straight line connects a source point with a target point. Similarly, the legal reasoning goes through straight lines along the parallel legal universe from a set of information to the possible set of legal outcomes.

101. *Id.*

102. The concept of Euclidean geometry describes the spatial arrangement of the physical universe in the pre-Einstein era. *See generally*, JEREMY GRAY, IDEAS OF SPACE: EUCLIDEAN, NON-EUCLIDEAN, AND RELATIVISTIC (Clarendon Press, 1989) (1979). His work represents an excellent exposition of the Euclidean geometry and its unique position in the history of mathematics of space.

103. *See supra* note 99.

104. Here I refer to systems of checks and balances envisioned by the Framers by recognizing the way they believed the physical universe behaved based on the information available at that time.

105. *See* Ghoshray, *supra* note 17. Here I discuss congressional oversight in controlling the presidential power.

proceeds by constructing a set of linearly placed stimuli or sources of information along the constitutional space. The determinacy of the Newtonian framework can be tested if a legal outcome could be determined with reasonable certainty under the shared power doctrine of concurrent authority. Setting aside the subjectivity inherent within the legal paradigm, the concept of false consciousness and presidential manipulation introduces sufficient distortion in the constitutional space, causing us to question the sustainability of the Newtonian framework envisioned by the Framers.[106] In the Newtonian framework, the constitutional space is envisioned as empty, unstructured, and physically disconnected from the objects acting within that space. Whereas, a parallel framework in the legal universe would hold the law to untangle itself from the environment in which it is to unfold. Applying this principle to the Supreme Court jurisprudence of presidential power would hold that the laws surrounding presidential assertion of war power can step back and operate in an environment without meddling itself with issues emerging from false consciousness or presidential manipulation. What the legal universe requires is that the legal reasoning process take a determining role in the process without being shaped by the process. While, this may be a viable process, clearly, as the legal consequences of Iraq War has proven,[107] merely being viable is neither satisfactory legal outcome nor logically acceptable.

Here, I am not challenging the existing modalities of law on grounds of inadequacy. Rather, I am questioning whether some aspects of jurisprudence have lagged behind in their ability to incorporate the shared wisdom of other disciplines. However, as I believe that through every legal consequence,

106. The Framers in the 18th century were aware of Newton's principia, the controlling laws of universe and modeled their thought process in accordance with that prevailing paradigm. *See* THE MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY, Isaac Newton, Andrew Motte, William Davis, William Emerson, John Machin, Translated by Andrew Motte Published by Printed for H.D. Symonds, 1803, Original from Oxford University Digitized May 15, 2006, available at http://books.google.com/books?id=fRwAAAAAQAAJ&dq=Principia:+Mathematical+Principles+of+Natural+Philosophy&pg=PP1&ots=qRSc9BoTgV&sig=tZgPMRbaI-om2E_pQ4-4KH9edYM&hl=en&sa=X&oi=book_result&resnum=8&ct=result.

107. I examine the legal paradigms surrounding the invasion of Iraq in detail in an earlier work. *See* Ghoshray, *supra* note 10.

we must question the outcome. We must verify whether the law is operating within perceptible bounds of logical certainty, as the law must reinvent itself with every significant change that society goes through. Therefore, in light of our enhanced understanding of the relationship between law and the society within which it operates, jurisprudence may be slow in reacting to the change in pace. This was echoed by Professor Tribe: "[L]egal problems in general, and constitutional problems in particular, have not always kept pace with widely shared perceptions of what makes sense in thinking and talking about the state, about courts, and about the role of both in society."[108] I do not hold the view that the legal universe is parallel to the Newtonian framework premised on checks and balances on every conceivable action that is untenable. I do, however, reject the framework that rests on the static assumption[109] of conceiving an exhaustive set of actions within the changing dynamics of the society, and expecting legal solutions for all such actions.[110] The assumption that every legal question can be answered within a legal environment, in which counter balancing forces provide adequate checks and balances, fails to address some particularized conflicting situations and is too farfetched.

For example, the existing constitutional space is not able to devise an appropriate solution for the proper allocation of war power between Congress and the President in a concurrent authority scenario, nor does it properly identify limits of presidential power under exigent scenarios. This is because the existing constitutional grants were devised in accordance with a static conception, under the assumption that legal formalism can be separated from the background of society, much like the Newtonian framework. In this framework the space is extracted from the forces and objects playing within. The existing jurisprudence refuses to entangle itself in the learning process and refuses to recreate itself like the society in operates within. On the contrary, if

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108. *See* Tribe, *supra* note 2, at 2.

109. I have discussed elsewhere the static interpretation of the Constitution. *See* Ghoshray, *supra* note 47.

110. Here I refer to the legal reasoning that attempts to structure solutions to all legal problems by restricting the meaning of constitutional text and thereby limiting the possibilities of outcome. *See id.*

laws were to follow the parallel universe of Einstein, in which the space could not be detached from the objects,[111] we would not suffer the constitutional inaction of legal consequences that the law cannot interpret.[112] In the post-Newtonian physical world of Einstein, space cannot be detached from the objects that are undergoing motions inside of it. The characteristics and actions of these objects under the application of force are primarily manifested by their relative distances and flight times of traversals within that space. The distances and times, however, are shaped by the construction of the space, more specifically by the curved nature of it. As a result, the space in the universe of Einstein is a continuum composed of both space and time, continually being altered amongst one another objects inside that space. The enquiry therefore shifts to whether the constitutional space can be characterized by some other form than linear discrete multi-dimensional space.

Perhaps, it is time to lend credence to the concept of curved space of the Constitution as proposed by Professor Laurence Tribe.[113] Does the Constitution have curvature where the shortest distance between two stimuli may not be arrived by traversing a straight line? Should we incorporate a different notion of the Constitution itself? I am referring to the very nature of the Constitution itself here, as opposed to the interpretive technique of static versus dynamic. While static constitutionalism is frozen in the eighteenth century meaning of the text and statutes, dynamic constitutionalism traces its meaning with the evolving context of the current times. I have dissected this issue in greater detail in an earlier work. [114]

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111. Here I refer to the relativistic framework, in which object's movement can be understood with respect to its connection to the very space that embodies the objects in reference. In the words of Albert Einstein, "Our world is not Euclidean. The geometrical nature of our world is shaped by masses and their velocities." *See* ALBERT EINSTEIN & LEOPOLD INFELD, THE EVOLUTION OF PHYSICS: FROM EARLY CONCEPTS TO RELATIVITY AND QUANTA (1938); *see also* ALBERT EINSTEIN, THE MEANING OF RELATIVITY, (5th ed. 1955)

112. *See* Tribe, *supra* note 2.

113. *Id.*

114. I examined the viewpoint of both static and dynamic Constitution in an earlier work. *See* Ghoshray, *supra* note 53. The Constitution adapts to the changing conditions in the society. As the frontiers of the freedom of speech, the freedom of religion, and the rights to privacy and sexual practices among consenting adults continue to expand within the meaning of our Constitution,

F. Definitional difficulties in Euclidean Constitutional Geometry

If the constitutional space is thought to be composed of texts, statutes, supporting historical documents and jurisprudential opinions, then the confluence of events that could potentially trigger the determination of an outcome may not always travel in a straight line. This is because the events or stimuli might be hidden relative to another stimuli or event. This can be explained by referring back to the various scenarios depicted in Section IV. In the first scenario, all the information available as the set of preconditions for going to war has responses that can be either constitutional or unconstitutional. Thus, the scenario can be properly handled within the existing legal paradigm. In contrast, let us take a look at both scenarios 3 and 4.

Scenario 3 brings in a rather undefined conception of presidential excesses, and the legal reasoning yields an indeterminate solution to this particularized conflict. Similarly, scenario 4 presents the ideas of false consciousness and presidential excesses, both of which are difficult to incorporate for yielding a legitimate legal consequence. Without actually engaging in the dialectic process of how false consciousness lowers the probative value of imminent danger for application of presidential authority, it is clearly not feasible to engage in constitutional analysis of the limits of presidential war power. However, if the process of legal reasoning does not get embroiled in the subjective discussion of executive excesses, the existing paradigm remains impotent to determine the legitimacy of presidential action of imposing war.

These two scenarios reveal situations in which the needed information remains occluded from view. It appears there is an information barrier preventing it from coming within the purview of legal reasoning. This is because the existing legal paradigm did not consider the information relevant for determination purposes, which would have

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we are confronted with its dynamic aspect. In most parlances, the phrases "dynamic Constitution" and "living Constitution" are used synonymously. *See generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 3–4 (2001) (explaining that the Constitution provides principles that the Court identifies and implements "through a highly moralized, philosophic inquiry").

required the legal reasoning process to engage laws with the actual environment. Similarly, in the parallel invocation in the physical universe, Newtonian conception of space could occlude objects that do not fall along the straight path between two objects.[115] On the contrary, in the curved space of Einsteinian framework, the objects could traverse the space along the curvature.[116] As a result, any object, anywhere along the path between two other objects, can be both connected and viewed from any vantage point. In addition, as the objects operate within a space-time continuum,[117] in which both the space and time move relative to each other, the exact location of each object can be determined in relation to any other object. Similarly, in the legal paradigm of curved constitutional space, laws become part of the changing societal structure and as such, are better equipped to deal with uncertainties of changing socio-legal environment.

When complex reasoning structures, borne out of diverging and continually expanding set of social circumstances, suffers from inadequacy from a static view of an indeterminate legal paradigm, while failing to become subsumed within the limited set of legal reasoning available,

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115. *See* U.S. INFO. AGENCY OFFICE OF RESEARCH AND MEDIA REACTION, *supra* note 91.

116. According to Professor Tribe:

> Newton's conception of space as empty, unstructured background parallels the legal paradigm in which state power, including judicial power, stands apart from the neutral, "natural" order of things. In the realm of physics, Einstein trenchantly criticized the world view in which space as such is assigned a role in the system of physics that distinguishes it from all other elements of physical description. It plays a determining role in all processes, without in its turn being influenced by them. Though such a theory is logically possible, it is on the other hand rather unsatisfactory. Newton had been fully aware of this deficiency, but he had also clearly understood that no other path was open to physics in his time. In Einstein's view, space is not the neutral 'stage" upon which the play is acted, but rather is merely one actor among others, all of whom interacting the unfolding of the story. Einstein's brilliance was to recognize that in comprehending physical reality the "background" could not be abstracted from the "foreground." In the paradigm inspired by Einstein, "[s]pace and time are now dynamic quantities: when a body moves, or a force acts, it affects the curvature of space and time –and in turn the structure of the space-time affects the way in which bodies move and forces act."

Tribe, *supra* note 2, at 7 (citations omitted).

117. *Id.*

they can easily find their legitimate place within the confines of this new legal paradigm. If we take out the detached neutrality of Archimedean indeterminacy from the legal process, it becomes more efficient to handle particularized conflicts like the preconditions for the Iraq War. Therefore, by shaping the legal reasoning process to mimic objects moving along the dimensions of a curved space, a much higher determinacy can be rendered into the legal paradigm. If the development of constitutional jurisprudence were to follow such trajectory, it would be reasonable to infer that the required complexity cannot be captured within the current legal reasoning methodology. How shall the explication of law proceed along the curvature space of the Constitution? This is a very difficult proposition, not addressed here. However, presenting an analysis to illuminate further the shadowy areas of curved constitutional space may provide greater recognition of the uniqueness of this paradigm.

G. False Consciousness and Curvature of the Constitution

I discussed in the preceding section, the organic way in which the false consciousness develops and allows the maximum point of authority for the President. The sticking point is to determine how the fundamental values within law allow such a scenario to develop. If law is based on strict formalism, which is in turn based on a proven (or provable) collection of facts,[118] how could there be an evolving fluid concept like false consciousness, which affects constitutional decision making? The problem resides in our inability to look for what is not there. This originates from a static conception of law, in which law is strictly prohibited from enmeshing itself into the changing dynamics of the society. We must therefore look beyond existing laws, and in some cases, we must go outside of law to understand law. The existing

118. According to Professor Tribe:

> To search the sciences for authoritative answers to legal questions, or any questions for that matter, is misguided. The formalist philosophy which views science as a "collection" of the "proven" or even for the "provable" is based upon an inappropriate reification. The better vision of science is a continual and, above all, critical exploration of fruitful insights; the better metaphor is that of a journey. Science is not much about proving as it is about improving. To look to the natural sciences for authority – that is, for certainty – is to look for what is not there.

Tribe, *supra* note 2, at 2 (citation omitted).

formalistic paradigm of legal reasoning does not always comport to a legal solution for complex, evolving problems we encounter in the society. As a result, the legal framework guiding the courts, are unable to provide solutions based on adequate reasoning. In my view, a lack of reliance on interdisciplinary application in law is one of the difficulties we currently have within the existing legal reasoning process.

Distressed by the inability of existing laws to adequately respond in the particularized conflicts of today's complexity, I am thus compelled to support Professor Tribe's constitutional curvature analogy[119] in pleading for the recognition of an evolving paradigm. I have shown[120] the drawbacks of Justice Jackson's tripartite solution elsewhere, which would have worked perfectly had the Constitution been of straightforward Newtonian design.[121] Under this framework, the three discrete scenarios of Justice Jackson would neatly fit within the conceptualized framework with its carefully balanced counter forces combating the forces, along the way providing bullet proof checks and balances. Unfortunately, as I have shown, this is indeed not the case.

If the constitutional space would be a perfect three dimensional space of Euclidian geometry, we would witness literal reasoning based on strict explication of 'if-then-else' rules applied perfectly. These rules would provide all the determinate outcomes and perfect solutions in all cases. In this construct, the background can be easily separable from the objects that interlink with each other, exerting forces on each other. In other words, in a simple constitutional space, the actors on this space, the courts, legislators, the executives, populist, and the external entities could all be liable to a rigid set of laws and be subjected to binding legal outcomes. However, as Professor Tribe mentioned, in a curved space, the objects cannot be separated from the space.[122] The newer legal paradigm of curved constitutional space cannot separate the subject of the law from the law itself. Here, the law must be continuously shaping, evolving,

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119. *See* U.S. INFO. AGENCY OFFICE OF RESEARCH AND MEDIA REACTION, *supra* note 91.

120. *See* Ghoshray, *supra* note 17, at Part IV.

121. *See* U.S. INFO. AGENCY OFFICE OF RESEARCH AND MEDIA REACTION *supra* note 91.

122. *See id.*

and structuring based on the existing circumstances.

An obvious question to consider at this point is, why did I bring in the concept of false consciousness along with the vision of constitutional curvature? The question can be more efficiently addressed by responding by showing how false consciousness gives rise to curved space phenomenon.

In the Newtonian world of linear geometric space, ideas are arranged linearly with respect to each other, and objects travel along straight lines. Therefore, nothing can be hidden from view for determination purposes. Similarly, in the parallel universe of legal reasoning, the law must be able to incorporate all pertinent information into the adjudication process. False consciousness is a difficult concept, yet highly relevant to the issue at hand. On one hand, it is hidden from the conceptual construct that engages in the legal reasoning of specific conflict in the existing paradigm. On the other hand, the curved space is composed of continually moving space and time, and every object can easily be identified. False consciousness needs such a paradigm. It needs a process of determination, which can capture the incremental juridical information and can contribute towards constitutional determination of legal conflicts.

We can corroborate the difficulty in specific constitutional issues by taking a comparative look at two opinions by two different Supreme Court Justices. In the first, Justice Jackson postulates a tripartite framework where he pigeonholes three occurrences of fluctuating presidential power. Justice Rehnquist, on the other hand alludes to a continuous spectrum at some point in between the maximum and minimum controlling powers of Congress, and it is at this point where the President's absolute authority could remain. This Rehnquist jurisprudential development can be more closely recognized within a curved constitutional space. A space that is not bounded by the limitations of linearity of dimensions is evident in Newtonian framework. If we refrain from identifying specific sets of actions under which the President can assert his power, we can map the possibilities and scenarios more efficiently.

For example, if the Constitution's objective is to create rules that can be applied to a set of predictable scenarios, by virtue of trying to identify them, we have already limited the possibilities. However, if we create a framework that is

applicable under most scenarios, but may not be perfect fit for every one of the scenarios, we can ensure that the framework is more robust and efficient.

By incorporating the environment in which the legal process unfolds, we can enhance the power of law in providing specific legal outcome for a complex scenario. This is much the same way as in a curved space, the motion of an object is determined by taking into consideration the impact due to the space that surrounds the object. In my view, we could derive an understanding of the allowable limits of presidential power by considering the shaping effect of the social environment in which the President is applying the laws of the nation. Grasping this shaping effect becomes easier as it follows a similar reasoning like the mechanics of objects in a curved space that takes account of the curvature the object has to traverse. Herein resides a very significant utility in bringing the curved space concept of physics into the legal universe.

As I have shown earlier, the prudent observer or the logical decision-maker can never be assumed to be completely decoupled from the scenarios or circumstances being called to judge upon. I therefore, lend my fidelity to Professor Tribe's observation regarding curved constitutional space. Although highly primitive in construction at this stage, this mode of legal reasoning promises to illuminate countless legal areas which still remain within constitutional black holes, unable to achieve legal certainty under the existing norm. I am not suggesting that the current adjudication process itself is flawed. Rather, I am suggesting the possibility that the neutrality can never be achieved and therefore the validity of the adjudicated process has to be questioned.

How can we prove whether there is a constitutional curvature? In a curved space, the object being observed can never be separated from the observer or the background. In other words, the relative distance or the relative mechanism of the space time continuum becomes the driving factor for a determination of the any information for the object.[123] Transferring this analogy in the legal universe, we can infer that the President's process of adjudication of the events to determine if there is an imminent danger should not be taken

123. *See id.*

at face value in determining whether the President's actions are constitutional. The President's relationships to the events that are unfolding in the political arena have to be taken into account. The implicit assumption here is that the President's own objective cannot be completely decoupled from the legal reasoning process. Therefore, legal reasoning must be decoupled from the shaping effect stemming from a multitude of complex, fuzzy phenomena, such as, personal aspiration of the executive, and injection of false beliefs and monolithic tendencies into the masses.

What does false consciousness have to do with the shaping of the constitutional space or constitutional geometry? As I demonstrated earlier, false consciousness is the culmination in a chain of events that creates a collective consciousness that gives an illusion of a real consciousness. So the question that comes into focus is whether the false consciousness alters the geometry of the constitutional space and if it does, how does it do that?

False consciousness creates a distorted prism, and by definition, anything or any input that goes through this distorted prism will provide a distorted output. Therefore, legal reasoning based on such distorted output will provide us with a completely wrong legal output. Evidence uncovered from the days leading to the Iraq War suggests that the President invoked significant danger by emphatically underscoring a doomsday scenario. This injected an illusionary reality into the collective consciousness of the nation. As a result, the collective consciousness inherited factors that contributed to its distortion by the process discussed in Section III.[124] Under these circumstances, the collective consciousness of the nation transformed via the injection of a false consciousness: believing in the existence of significant immediate danger from Iraq.[125] The President invoked his expansive power under Article II of the Constitution[126] and imposed war on both the nation and the world by using an indifferent and inert Congress.[127] The linear geometry of the constitutional space made erroneous

124. *See* Proyect, *supra* note 71.
125. *Id.*
126. *See* FISHER, *supra* note 21.
127. *See* Ghoshray, *supra* note 17.

assumptions on several grounds. First, it assumed that the distance between the nation's observation of imminent danger and the legal consequence of such imminent danger as engaging in war is connected by a simple straight line. If we take the analogy of a direct deductive reasoning as a geometric straight line, the imminent danger of a nation must result in an invasion of the aggressor. Second, the legal reasoning assumed that the President is a neutral adjudicator with detached neutrality in the proceedings, which turned out to be erroneous.[128] Third, this assumption that the legal consequence of unleashing war on the aggressor will cause either a minimization or complete removal of the source of the imminent danger was not founded upon provable facts. This limited set of fact patterns and legal reasoning within the constitutional analysis is therefore, proven to be completely inadequate for any substantive determination of constitutional consequence.

The assumption that the imminent danger doctrine must automatically give rise to the invasion of Iraq is plain wrong. The constitutional geometry is not delineated and separable with easily identifiable objects and therefore, it may not be possible to reach directly into an outcome of war from a source of imminent danger. There are alternative destinations that could be attempted first. For example, is danger *imminent* as a result of false consciousness? Or, are the assumptions that come into play to define and identify imminence completely wrong? Second, false consciousness may have mischaracterized the intensity of the threat and therefore may have misdiagnosed or mislabeled the imminent danger aspect. If the characterization of imminent danger is not credible, then the conclusion of imposition of war cannot be validated. In a constitutional space characterized by a curvature or multiple explaining points that could lead to the genesis of a false belief of the imminent danger, we are provided with multiple options like negotiating with Iraq, developing consciousness of the world community, embargos, sanctions, negotiation vis-à-vis a neutral third party, or simply waiting for more data. Third, once we are convinced that there is neutral detachment involved, then the rationale or action of the President is better characterized and

128. *See* Ghoshray, *supra* note 47.

analyzed in its proper light. Because it is possible that the President may not be acting in the best interests of the nation or without due prudence or even with vengeance, it is easy to see the produced outcome of going to war may be untenable.

In my view, if we analyze events of extreme significance during the process of legal observation, we must consider that the factors taken into account for making judgment may be misperceived due to false consciousness. Therefore, we must operate in a curvature space-type legal geometry. In this curved geometry of constitutional space, the legal terrain will continue to reshape the inputs that the adjudicative process incorporates into decision-making. Additionally, the relative relationship between the scenarios that are used to make judgment and adjudicate have to be analyzed carefully to deconstruct the relative merits and the explanatory power that it possesses. If these factors are influenced by false consciousness, then I propose minimizing the explanatory power. This would result in a presidential authority far lesser than the one which led the country into war with Iraq.

VI. CONCLUSION

In the wake of presidential transgressions related to use of manufactured intelligence for foreign invasion, unilateral excesses of executive power has suddenly sprung to life. Notwithstanding the countless calamities that resulted from such misadventure, scholars diverge on the legality of presidential usurpation of power. Constitutional uncertainty regarding the nature of concurrent authority between Congress and the President, has been debated, yet nothing concrete has come out of those discussions. My earlier research has thrown light on this narrow swath of constitutional significance, where I have established that the debate over optimal allocation of power between Congress and the President is far from being over. I embark on an exploration to trace whether there is a better legal paradigm that can explain the complex constitutional quandaries in this area.

In this article, I brought in the concept of false consciousness to provide a benchmark for examining how the issues of presidential power cannot be determined with logical certainty within the current legal paradigm. This examination presents sufficient evidence to show that the

parallels from the world of physics can help us in this endeavor. By assuming the texts and statutes of the Constitution mimic the dynamic nature of time-space theory of Einstein, rather than the Newtonian framework of linear space, we are able to capture the uncertainties and complexities better.

On one hand, false consciousness can distort the realities to eventually shape the contours of presidential power. On the other hand, the curvature concept of the Constitution provides the inspiration for a powerful legal reasoning technique. Therefore, this Article's evidence of false consciousness' shaping effect provides us with a strong reminder that we should embrace post-modernity in our jurisprudential discourse, and attempt to inculcate concepts, such as, the curved constitutional space. In the end, my hope is to retain proximate fidelity to the Constitution, not by blindly acquiescing to the indeterminacy of the controlling legal paradigm, but by seeking ways to meld disciplines to illuminate the dark shadows of the constitutional curvature.

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